UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Special Counsel Investigation	:	**Case No. 04-MS-297 (D.D.C.)**
	:	**(Chief Judge Thomas F. Hogan)**
(Grand Jury Subpoena to Tim Russert)	:	
	:	**UNDER SEAL**

GOVERNMENT'S RESPONSE TO MOTION TO QUASH GRAND JURY SUBPOENA

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, responds as follows to the motion to quash the grand jury subpoena served on Tim Russert:

INTRODUCTION

The Special Counsel is conducting a grand jury investigation into whether violations of federal law occurred relating to unauthorized disclosure by government employees of information concerning the identity of a purported CIA employee. Because the motion to quash has been filed by a prospective witness in an ongoing grand jury investigation, the movant and the government are filing their legal briefs under seal. In addition, the government is filing *ex parte* and under seal the Affidavit of Special Counsel Patrick J. Fitzgerald.

As this Court is well aware, the secrecy of grand jury proceedings must be maintained in order to encourage voluntary participation, and full and frank testimony, of

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witnesses, to protect witnesses from retribution and inducements, and to assure that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998)(*quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979)). The Affidavit of Special Counsel has been filed *ex parte* and under seal with the Court because it makes extensive references to sensitive grand jury information, including the identities of witnesses, the substance of grand jury testimony, and the strategy or direction of the investigation, which is continuing. *In re Sealed Case No. 98-3077*, 151 F.3d at 1075 (to protect grand jury secrecy, independent counsel entitled to submit evidence to rebut claim of Fed. R. Crim. P. 6(e) violation *ex parte* for *in camera* review by district court); *In re Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir. 1994) (government's *in camera* proffer as to the existence of the crime-fraud exception did not violate due process though it deprived other party of full opportunity to be heard, in light of overriding need to preserve grand jury secrecy). *See also United States v. R. Enterprises, Inc.*, 498 U.S. 292, 302 (1991)(suggesting that district courts require *in camera* disclosure of the subject of investigation to discourage routine use of motions to quash subpoenas as a form of discovery).

SUMMARY OF ARGUMENT

Tim Russert ("movant"), a journalist with NBC, has been subpoenaed to testify before the grand jury. The Special Counsel has identified to movant the testimony sought by the grand jury as being limited to conversation(s) on or about July 10, 2003 (and any follow-up

conversations) with I. Lewis ("Scooter") Libby. The Special Counsel has informed movant that Libby has executed, with the advice of counsel, a waiver of any confidentiality in these conversations with movant. Movant also has been informed that the Special Counsel does not expect to inquire into any information provided to movant as potential news or background information, but does expect to inquire into whether or not movant imparted certain information to Libby.

Russert moves to quash the subpoena on the ground that, as a journalist, his testimony before the grand jury will involve "both the identity and the substance of confidential communications he had with a source in the course of news gathering." Mem. at 1. This, movant contends, "infringes on [his] right to maintain a confidential relationship with his sources." *Id.* In support of his motion to quash, movant argues that the law supports the existence of a reporter's privilege that requires the government to make a preliminary showing to this Court that the grand jury testimony sought is both necessary and crucial. Mem. at 6.

The motion to quash fails to come to grips with the fact that in a grand jury investigation, absent a showing that the grand jury investigation is being conducted in bad faith for the purposes of harassment, the Supreme Court has held that there is no reporter's privilege not to testify, even if the testimony reveals confidential sources and information. *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Court of Appeals for this Circuit has interpreted *Branzburg* to mean what it says -- and what it says forecloses movant's claim of

privilege. There has been no allegation, much less a showing, that the instant grand jury investigation constitutes the sort of bad faith investigation designed to harass the press that would authorize a court to intervene to protect First Amendment interests.

Movant invokes decisions recognizing some form of reporter's privilege in civil cases and other contexts, and points to the D.C. "shield law" and the Department of Justice regulations concerning internal procedures for the issuance of subpoenas to the press. Movant contends that this Court should recognize a right to have the Court scrutinize whether the grand jury testimony sought is necessary and crucial and to balance the need for the testimony against the interests of the press. This argument is foreclosed by *Branzburg*, in which the Supreme Court expressly determined that a reporter's privilege was not in society's best interests because it would impede the proper functioning of the grand jury. This Court should compel compliance with the subpoena without performing any balancing of interests.

Even if this Court were to engage in a process of balancing interests of law enforcement and the press under the standard applied in civil cases in this Circuit, or the Department of Justice guidelines for issuing press subpoenas, based on the circumstances of this investigation, the motion to quash should be denied. The facts show that the investigation has been conducted in good faith and that the subpoena to movant is necessary, because all available alternative means of obtaining the information have been exhausted, and the testimony sought is important to the successful completion of an investigation of

possible violations of federal law.

The argument below first addresses movant's claim of privilege. The second section of the argument, in conjunction with the Special Counsel's *ex parte* affidavit, establishes that even if this Court were to apply the standards for balancing interests in civil cases and the Department of Justice guidelines, any claim of privilege is amply overcome and compliance with the subpoena should be required.

ARGUMENT

I. Movant Has Failed to Show That the Subpoena Was Issued in Bad Faith or for Purposes of Harassment and, Thus, Compliance with the Grand Jury Subpoena Is Not Unreasonable or Oppressive.

A motion to quash a grand jury subpoena requires a showing that "compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). The law presumes that a grand jury acts within the legitimate scope of its authority and the burden of showing that a subpoena is unreasonable or oppressive is on the movant who seeks to avoid compliance. *United States v. R. Enterprises*, 498 U.S. 292, 300-01 (1991). The assessment of whether a grand jury subpoena is unreasonable must also take into account the grand jury's "unique role in our criminal justice system." *Id.* at 297. As an investigatory body with the responsibility of determining whether or not crimes have been committed, the grand jury must "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *Id.* "A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a

specific offense has been identified and a particular defendant charged." *Id.* Grand jury subpoenas do not require the same preliminary showings as trial subpoenas because such requirements would delay and impede the work of the grand jury and compromise the secrecy of grand jury proceedings. *Id.* at 298-99.

The primary basis for movant's contention that compliance with the grand jury subpoena issued to him would be unreasonable and oppressive is his claim of a "reporter's privilege" rooted in the First Amendment and common law. Absent a showing that the grand jury subpoena was issued in bad faith for the purpose of harassment, movant's claim of a privilege not to testify before the grand jury is foreclosed by *Branzburg v. Hayes,* 408 U.S. 665 (1972). In *Branzburg*, several reporters served with grand jury subpoenas argued for recognition of a First Amendment reporter's privilege on the ground that identifying confidential sources and information to a grand jury would deter persons from providing information to the press "to the detriment of the free flow of information protected by the First Amendment." *Id.* at 679-80. The reporters asserted that they should not be required to testify before the grand jury until the government made a showing that the testimony was necessary and that requiring the testimony was justified by a compelling public interest. *Id.* at 680.

The Supreme Court, noting that the creation of new testimonial privileges obstructs the search for truth, expressly declined to interpret the First Amendment "to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. The Court stated:

> Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

Id. at 691. The Court concluded that the refusal to recognize a First Amendment reporter's privilege would not seriously undermine the ability of the press to collect and disseminate news, and that even if some news sources would be deterred, it could not "accept the argument that the public interest in possible future news about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.* at 695-99.[1]

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[1]It is the compelling public interest in investigating crime that justifies requiring the disclosure of confidential sources and distinguishes *Branzburg* from other situations where the Supreme Court has protected anonymity. *See, e.g., McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) (state ban on anonymous leafletting overturned). See also United States v. Garde, 673 F.Supp. 604 (D.D.C. 1987) (federal regulatory subpoena issued to attorney for identity of client whistleblowers quashed).

Bartnicki v. Vopper, 532 U.S. 514 (2001), cited by movant for the proposition that there is a First Amendment right to discuss public matters in confidence, Mem. at 11, is inapposite. In that case, the Supreme Court recognized a defense grounded in the First Amendment to a damages action for disclosure of unlawfully intercepted telephone conversations. *Bartnicki* recognized that while there is a First Amendment interest in privacy of communications (in order to foster the exchange of ideas and information), this interest was outweighed by the First Amendment interest in publishing matters of public importance. 532 U.S. at 534. The Court's footnote, quoted by movant, acknowledges limits on the freedom not to speak: "There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly . . . ." *Id.* at 532 n.20. Of course, one such limit is the duty to testify in response to a grand jury subpoena.

The Court also addressed the question of whether it was wise to confer constitutional protection on those who commit crimes or have information concerning a crime. The Court stated:

> The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert–and no one does in these cases–that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws.

Id. at 691. The Court added: "[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 695-96. On these grounds, the Court rejected the suggestion that courts conduct a case-by-case balancing of interests each time a journalist is subpoenaed by a grand jury, in part because such case-by-case balancing would "present practical and conceptual difficulties of a high order." *Id.* at 701-06.

At the end of the majority opinion in *Branzburg*, the court noted that in cases where grand jury investigations are conducted in bad faith, without legitimate law enforcement purposes, or to harass the press and disrupt relationships with news sources, a court would be authorized to grant a motion to quash on First Amendment grounds. *Id.* at 707-08. Justice Powell, who joined the majority opinion,[2] wrote a brief concurring opinion underscoring the point made by the majority:

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[2]Justice Powell's concurring opinion is not an separate opinion concurring only in the judgment. Justice Powell was one of five Justices joining Justice White's opinion for the court, so Justice White's opinion is a majority opinion and not a plurality opinion.

> As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicates confidential source relationship without legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim of privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 709-10.

A fair reading of Justice Powell's concurring opinion makes clear that his purpose was to emphasize a point made in the majority opinion: In cases where grand jury investigations were being conducted in bad faith to harass the press, a court could consider a motion to quash. Justice Powell noted that in evaluating a motion to quash in a case of alleged harassment of the press, that a court would not apply the "heavy burdens of proof to be carried by the state" advocated by the dissent in *Branzburg*. *Id.* at 710 n.*. In a case where a grand jury subpoena is served on a reporter, the dissent in *Branzburg* would have required the government to make showings of relevance, necessity, and compelling and overriding interests as a precondition to enforcing the subpoena. *Id.* at 743 (dissenting opinion). Justice Powell explicitly stated that, even in a case of alleged harassment of the press, a court would not apply the rule proposed by the dissent, because in applying such a rule "the essential societal interest in the detection and prosecution of crime would be heavily subordinated."

Id. at 710 n*. Justice Powell's short concurring opinion, fairly read, does not contain "disclaimers" regarding the majority opinion as suggested by the dissent. *See id.* at 745 n.36 (Stewart, J., dissenting). Instead, Justice Powell's concurring opinion emphasized a point made in the majority opinion in which he joined; the only disclaimers concerned points made in the dissenting opinion.[3]

The Supreme Court's decision in *Branzburg* held that in the context of a good faith grand jury investigation there is no First Amendment reporter's privilege requiring a special showing that the reporter's testimony is necessary. Although the Supreme Court has not directly addressed the issue since *Branzburg*, the Court has reiterated its holding. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary."); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and

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[3]Justice Powell's dissenting opinion in *Saxbe v. The Washington Post Co.*, 417 U.S. 843 (1974) is fully consistent with this interpretation of his concurring opinion in *Branzburg*. In *Saxbe*, Justice Powell wrote that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated." 417 U.S. at 859. This statement simply takes note of what the majority opinion and Justice Powell's concurring opinion in *Branzburg* made clear: In grand jury investigations, First Amendment freedoms are implicated, but in light of society's compelling interest in law enforcement, the reporter's claim of privilege must yield, unless the investigation is in bad faith for the purpose of harassment.

answer questions relevant to a criminal investigations, even though the reporter might be required to reveal a confidential source.") The *Branzburg* decision's acknowledgment (emphasized by Justice Powell) that grand jury investigations conducted other than in good faith or for purposes of harassment "would pose wholly different issues for resolution under the First Amendment," 408 U.S. at 707, in no way detracts from the clear holding of the case, which rejects any reporter's privilege in the context of a good faith grand jury investigation.

The plain import of the *Branzburg* decision has been embraced by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 570-71 (D.C. Cir. 1977).[4] Confronted with a claim by the appellant that *Branzburg* protects newsmen from grand jury questioning unless the government makes preliminary showings of relevance and necessity, the court stated that appellant's claim "though wholly unsupported by the holding in *Branzburg* is not without adherents." *Id.* at 570. Noting that the dissenting opinion in *Branzburg* had proposed a similar approach, the court stated:

> The *Branzburg* majority, however, rejected that formulation in clear and unmistakable terms. In their view, its adoption would frustrate the historic role of the grand jury in determining possible violations of law. Further, its recognition would needlessly "embroil() (courts) in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance . . . ." These considerations "disposed of the reporters' claims that preliminary to requiring their

[4]In an earlier decision, the D.C. Circuit noted that *Branzburg* was decided in the context of a grand jury investigation, and stated: "In a grand jury context, the First Amendment considerations cannot prevail, *e.g.*, to preclude a witness from giving information as to a crime he has witnessed." *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972). The court stated that *Branzburg* might have different implications in the context of a trial. *Id.*

> grand jury appearance, the State must show that . . . (reporters) possess relevant information not available from other sources . . . ."
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> The *Branzburg* opinion did not leave newsmen completely without protection from indiscriminate probing for news sources. In particular, the Court observed that official harassment of the press undertaken solely to disrupt a reporter's relationship with news sources would clearly be subject to judicial control. In a separate opinion, Mr. Justice Powell, who also concurred in the opinion of the Court, emphasized and elaborated upon this aspect of the majority opinion[.]

Id. at 570-71 (footnotes omitted). After quoting from Justice Powell's concurring opinion, the court stated:

> We conclude that *Branzburg* squarely rejected the very privilege appellant asserts that it established. A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury questions are put in bad faith for the purpose of harassment, he can call on the courts for protection.

Id. at 571.[5]

In a later decision, the D.C. Circuit reaffirmed this reading of *Branzburg*. *Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co.*, 593 F.2d 1030, 1061-62, n.107 (D.C. Cir. 1978). In *Reporters Committee*, the court noted that *Branzburg* held that "journalists have no special First Amendment right to maintain the secrecy of their sources in the face of good faith felony investigations." *Id.* at 1050. The court interpreted *Branzburg* as explicitly rejecting case-by-case judicial balancing of interests

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[5]The fact that the appellant in *In re Possible Violations of 18 U.S.C.* was a religious worker arguing for a First Amendment privilege based on freedom of religion rather than freedom of the press does not alter the court's authoritative reading of *Branzburg*, which was the basis for the court's holding that no preliminary showing needed to be made by the government. This reading of *In re Possible Violations of 18 U.S.C.* is fully consistent with this Court's analysis of that case in *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10-11 (D.D.C. 1996).

in good faith grand jury investigations. *Id.* at 1061. The court stated that Justice Powell's concurring opinion was "fully consistent" with the *Branzburg* majority's rejection of a case-by-case balancing approach in good faith grand jury investigations. *Id.* at 1061 n. 107. The court stated:

> Although Justice Powell refers to case-by-case "balancing," it is clear that he is actually referring to the availability of judicial case-by-case screening out of bad faith "improper and prejudicial" interrogation. Indeed, this court has already so interpreted Justice Powell's opinion in [*In re Possible Violations of 18 U.S.C. 371, 641, 1503*].

Id.[6]

These precedents have been applied by this District Court in denying a motion to quash grand jury subpoenas directed at the media. In *In re Grand Jury 95-1*, 59 F. Supp. 2d 1 (D.D.C. 1996), this Court applied *Branzburg* in light of the D.C. Circuit's interpretation. Consistent with the Court of Appeals decision in *In re Possible Violations of 18 U.S.C.*, this Court stated that in the absence of bad faith or harassment, the *Branzburg* decision means that the government is not required to make a preliminary showing before requiring a reporter to testify before a grand jury. 59 F. Supp. 2d at 10-14. This Court rejected the argument that Justice Powell's concurring opinion in *Branzburg* authorizes the District Court to balance interests, finding that Justice Powell's concurring opinion was consistent with the *Branzburg* majority, which determined that "if ever, the balance of interests may apply only when the grand jury's inquiry is not conducted in good faith." 59 F. Supp. 2d at 14. This Court noted

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[6]In *Reporters Committee*, Judge Wilkey wrote the opinion for the court. Judge Robinson concurred in all but one section of Judge Wilkey's opinion. Judge Robinson concurred in the portions of the opinion interpreting *Branzburg*. *Id.* at 1047 n.50, 1071 n.4.

that engaging in a balancing of interests on a case-by-case basis would result in the sort of "procedural delays, detours, and disruptions in grand jury investigations" that the Supreme Court has warned against in cases like *R. Enterprises*. 59 F. Supp. 2d at 14.[7]

This Circuit's application of *Branzburg* in the context of a good faith grand jury investigation finds support in the decisions of several other circuits. *See In re Grand Jury Proceedings*, 5 F.3d 397, 399-404 (9th Cir. 1993); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992); *In re Grand Jury Proceedings*, 810 F.2d 580, 587-88 (6th Cir. 1987); *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998); *In re Grand Jury Subpoena American Broadcasting Co.*, 947 F. Supp. 1314, 1317-20 (E.D. Ark. 1996).

The only case cited by movant, and the only one research revealed, that involved the quashing of a grand jury subpoena is *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d. Cir. 1992). The opinion of the district court in *Williams* is inconsistent with the holding of *Branzburg* and cannot be squared with the cases

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[7]In its opinion in *In re Grand Jury 95-1*, this Court stated that there was no issue of the revealing of confidential sources by the reporters before the Court and that if the grand jury attempted to learn the journalist's sources, that the journalists "may seek protection from the Court." 59 F. Supp. 2d at 14. The Court did not reach the reporters' argument that *Branzburg* calls for case-by-case judicial screening when a grand jury, operating in good faith, seeks the identity of a confidential source. The government submits that the rejection of special protection of confidential sources in the grand jury is at the core of the *Branzburg* decision. *Reporters Committee*, 593 F.2d at 1050. Moreover, in this case the grand jury seeks information about conversations on certain dates with Lewis Libby, who we believe called Russert to complain about another reporter's coverage. We do not believe that Libby imparted information to Russert and thus did not act as a confidential source on that occasion. In any event, Libby has waived confidentiality. Movant does not state in his filing whether Libby ever acted as a confidential source.

in this Circuit interpreting *Branzburg*. In the opinion of the district court in *Williams*, the court interpreted the Third Circuit's broad recognition of a journalist's qualified federal common law privilege to require a demonstration by the government of necessity to prevent a grand jury subpoena from being quashed. 766 F. Supp. at 367-69, citing *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

The district court's basis for extending the Third Circuit's expansive reporter's privilege to the grand jury context despite *Branzburg* was flawed. First, the district court relied on an incorrect reading of Justice Powell's concurring opinion, essentially concluding that Justice Powell's concurrence authorized case-by-case judicial balancing of interests in all cases where grand juries subpoena the press. 766 F.Supp. at 368. Of course, the *Branzburg* majority, including Justice Powell, meant that case-by-case balancing would occur only in cases of bad faith harassment. The position espoused by the district court in *Williams* tracked the position of the *Branzburg* dissenters rather than the majority.

Second, the district court rejected the government's position that *Branzburg* foreclosed finding a reporter's privilege in the grand jury context on the ground that Fed. R. Evid. 501, adopted after *Branzburg*, provided a mandate to courts to further develop common law evidentiary privileges. 766 F. Supp. at 367-68. However, Rule 501 was meant to "[leave] the law of privileges in its present state" and provided that the common law of privileges would continue to be developed by the federal courts. *Advisory Committee Note,*

Rule 501. The district court ignored the fact that the *Branzburg* decision explicitly considered and rejected the invitation to find a common law First Amendment reporter's privilege in the grand jury context. The Supreme Court canvassed the common law and found the "great weight of authority is that newsmen are not exempt from the normal duty of appearing before the grand jury to give evidence." 408 U.S. at 685. The Supreme Court also surveyed statutory privileges provided by the states, and noted the lack of federal statutory protection for a reporter's privilege and lack of a proposed Federal Rule of Evidence for a reporter's privilege. *Id.* at 689-91. In refusing to adopt a First Amendment reporter's privilege, the Supreme Court emphasized the interference with the functioning of the grand jury that such a privilege would entail. *Id.* at 686-87. The district court in *Williams*, invoking the common law authority to develop privileges under Rule 501, created a privilege that the Supreme Court explicitly rejected as not in the best interests of society. In sum, the district court's decision in *Williams* is at odds with *Branzburg* and the interpretation of *Branzburg* in this Circuit. *See In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993)(declining to follow *Williams* on the ground that it directly conflicts with the Supreme Court's holding in *Branzburg*).

In the face of the clear authorities in this Circuit, movant asserts that the law is to the contrary. Movant principally cites a series of civil cases and one criminal case from this Circuit. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the Court of Appeals recognized a First Amendment reporter's privilege in civil cases, distinguishing *Branzburg* on the

ground that the Supreme Court "justified the decision by pointing to the traditional importance of grand juries and the strong public interest in effective criminal investigation." *Id.* at 711. The court found that "in civil cases, where the public interest in effective law enforcement is absent, [*Branzburg*] is not controlling." 656 F.2d at 711, citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974). *See also*, *Clyburn v. New World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990). Under the approach of the *Zerilli* line of cases, when a civil litigant seeks to subpoena a member of the press, the district court is supposed to balance the litigant's need for the information, considering the efforts to obtain the information from alternative sources, against the public's interest in protecting a reporter's confidential sources. *Zerilli*, 656 F.2d at 711-14. Whatever the merits of the cases adopting the *Zerilli* approach to the reporter's privilege in civil cases, by their very terms those decisions do not limit *Branzburg* in the context of the grand jury, nor do those cases undermine this Circuit's interpretation of *Branzburg* in *In re Possible Violations of 18 U.S.C.* or *Reporters Committee.* [8]

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[8]The government acknowledges that this Circuit has held a qualified reporter's privilege applicable in civil actions and that the district court has applied that holding in a number of cases. *See, e.g., Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 19-20 (D.D.C. 2003); *Grunseth v. Marriott Corp.*, 868 F.Supp. 333, 334-36 (D.D.C. 1994). Several other circuits have found a qualified reporter's privilege in civil cases. *See, e.g., In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *Shoen v. Shoen*, 3 F.3d 1292-93 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). As discussed in a recent opinion of the Seventh Circuit Court of Appeals, the number of cases finding such a privilege in civil proceedings and criminal trials is "rather surprising in light of *Branzburg*." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003)("The approaches that these decisions take to the issue of privilege can certainly be questioned.").

The criminal case from this Circuit cited by movant is *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000). According to movant, the *Ahn* decision definitively resolved the issue of a journalist's immunity from compelled disclosure in criminal proceedings and "removed any doubt that its previous discussion of the rights of journalists in *In re Possible Violations of 18 U.S.C. . . .*, a case not involving a journalist at all, was *dicta*." Mem. at 7. Movant's claim that the *Ahn* decision definitively adopted a balancing approach for grand jury proceedings or for criminal trials is plainly wrong. In *Ahn*, a criminal defendant sought to withdraw his guilty plea on the ground that the government had "breached its duty of good faith and an implied promise of secrecy by leaking information to the news media about his arrest." 231 F.3d at 29. The government responded that there was no implied promise of secrecy and, in addition, submitted testimony and affidavits denying it had leaked the information. *Id.* at 37. The defendant subpoenaed the two television reporters who allegedly received the leak, and the reporters filed a motion to quash, "arguing that reporters possess a qualified privilege not to disclose confidential sources." *Id.* The district court found that there was no implied promise of secrecy and that the defendant had not carried his burden of establishing that the government caused the leak. *Id.* The district court granted the reporter's motion to quash, finding that the defendant had not demonstrated that reporter's qualified privilege should be overcome. "The district court found that the reporters' testimony was not 'essential and crucial' to Ahn's case and was not relevant to determining Ahn's guilt or innocence." *Id.* The Court of Appeals, in a single paragraph discussion of the

issue, concluded: "Because we agree that Ahn failed to carry his burden, we hold that the district court did not make an error of law or abuse its discretion in granting the reporters' motion." *Id.*

The first and most important point about the Court of Appeals' *Ahn* decision for present purposes is that it did not involve a subpoena to a reporter in a grand jury proceeding. The only mention of grand jury proceedings was a *"Cf."* citation to *Branzburg*. There is nothing in the *Ahn* decision suggesting that it was announcing any change in the law concerning the scope of the reporter's privilege in the grand jury context or that it had any implications for the prior clear statements by the Court of Appeals in cases applying *Branzburg* in the grand jury context, such as *In re Possible Violations of 18 U.S.C.*

Furthermore, a close examination of the proceedings in *Ahn* shows that the decision of the Court of Appeals does not have the significance movant claims even in the context of criminal trials.[9] As the transcript of the district court proceedings (Exhibit K to Levine

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[9]The government submits that *Ahn* did not resolve in this Circuit the open question of the appropriate application of *Branzburg* to a motion to quash a subpoena to a reporter for testimony at a criminal trial. Soon after *Branzburg* was decided, this Court applied Branzburg's holding in a criminal trial. *United States v. Liddy*, 354 F. Supp. 208, 213-17 (D.D.C. 1972). Decisions in some other Circuits point to that result. *See, e.g., United States v. Smith*, 135 F.3d 963, 968-72 (5th Cir. 1998); *In re Shain*, 978 F.2d 850, 852-54 (4th Cir. 1992). *But see United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979)(the district court interpreted *Branzburg* as requiring case-by-case balancing of interests and applied that approach in a criminal case). Several other Circuits have found that such balancing is appropriate in criminal trials. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1503-04 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980). The question of the application of *Branzburg* outside the context of a grand jury proceeding is not presented by the litigation now before the Court.

Declaration) reflects, there was no disagreement between the parties concerning the appropriate case law to apply. Levine Decl. Exhibit K at 53. Both counsel and the court relied on *Zerilli*, a leading case addressing the reporter's privilege in the civil context. *Id.* In addition, the district court specifically stated that it was treating the defendant's motion to withdraw his plea of guilty based on a breach by the government as "a breach of contract issue." *Id.* at 55. The district court also noted that the subpoenaed testimony did not go to guilt or innocence nor was it crucial to the trial of a case. *Id.* at 55-56. Thus, the district court proceedings in *Ahn* and the subsequent Court of Appeals decision cannot be read to impact the law concerning the reporter's privilege in grand jury proceedings, and any legal impact the case may have appears limited to the application of the reporter's privilege in the context of a defendant's motion to withdraw a plea of guilty based on breach of the plea agreement. *Ahn* simply does not establish the proposition movant contends it does.

As additional support for recognition of a reporter's privilege in the grand jury context, movant points to the District of Columbia "shield law." *See* D.C. Code §§ 16-4701 to 4704. As this Court has recognized, "Whatever may be its force in the context of a civil common law action in a court of the District of Columbia . . . the D.C. statute is inapplicable here." *Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 17 (D.D.C. 2003). This Court noted that evidentiary privileges in cases arising under substantive federal law are governed exclusively by federal law, and that Congress has never enacted a federal counterpart to the D.C. "shield law." *Id.* And the *Branzburg* decision itself, noting that

Congress had not legislatively created a reporter's privilege in the grand jury context, expressly declined to do so. 408 U.S. at 698-90.

Finally, movant suggests that even if this Court finds *Branzburg* dispositive of movant's claim of a privilege rooted in the First Amendment, that the Court should fashion a non-constitutional common law reporter's privilege in the grand jury context under the authority of Fed. R. Evid. 501. In *Branzburg,* the Supreme Court analyzed the common law, noted the lack of federal legislation, and expressly declined to create the privilege in the grand jury context, emphasizing the burdens such a privilege would impose on the functions of the grand jury. 408 U.S. at 685-91. As discussed above in the analysis of the district court's reasoning in *In re Williams,* 766 F. Supp. 358 (W.D. Pa. 1991), Rule 501 retained the common law development of privileges and *Branzburg*'s previous rejection of the reporter's privilege still represents the Supreme Court's resolution of the issue. As the Ninth Circuit has stated, "We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate." *In re Grand Jury Proceedings*, 5 F.3d at 403 n.3. *See also*, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988)(rejecting reliance upon a federal common law privilege wholly apart from the First Amendment); *United States v. Liddy*, 354 F. Supp. 208, 214 (D.D.C. 1972)("Such a privilege, if it exists, must grow out of the First Amendment free press guarantee . . . . The moving parties in *Branzburg* sought a privilege, but the Court declined to grant it.").

Despite *Branzburg*, movant suggests that this Court should look to existing press "shield laws" and the Department of Justice guidelines concerning press subpoenas as authority for recognizing a reporter's privilege on a basis independent of the First Amendment. This suggestion is odd, in part because "shield laws" and the Department of Justice guidelines are rooted in First Amendment concerns.[10] Not surprisingly, courts claiming to recognize the privilege under common law principles tend to invoke First Amendment interests. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980)(federal common law qualified privilege based in part on "strong public policy" that is "grounded" on the First Amendment" and finding support in *Branzburg's* acknowledgment of some First Amendment protection for news gathering). Ultimately, the creation of a common law reporter's privilege in the grand jury context is "tantamount to . . . substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion." *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).

Movant's claim of a reporter's privilege requiring this Court to engage in a balancing of interests, and requiring the government to make a preliminary showing to overcome the asserted privilege, is without merit. Absent a showing of a bad faith grand jury investigation conducted for the purpose of harassing the press, the Supreme Court has rejected movant's

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[10]With respect to the Department of Justice guidelines, the Supreme Court noted the existence of the guidelines in *Branzburg*. 408 U.S. at 706-07 n. 41. It is apparent that the Supreme Court viewed the guidelines as cutting *against* recognition of the proposed privilege.

claim in very plain terms. *Branzburg* forecloses movant's argument. On this basis, the motion to quash should be denied and compliance with the subpoena should be required.

II. Even if the Court Were to Balance Competing Interests, Compliance With the Subpoena Would Be Required, Because the Public's Compelling Interest in Effective Law Enforcement Outweighs the Incidental Burden on the Free Flow of News, If Any, Resulting from Compliance.

Contrary to the movant's contention, the subpoena meets and exceeds the Department of Justice guidelines related to the issuance of subpoenas to news media, and easily satisfies the balancing test applicable to civil cases under D.C. Circuit law.[11] Thus, compliance with the challenged subpoena is required under any possible legal standard.

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[11] As discussed above, the balancing test is not applicable in the grand jury setting. Moreover, the DOJ guidelines do not "create or recognize any legally enforceable right in any person," and, thus, do not provide an independent basis for quashing the instant subpoena. 28 C.F.R. § 50.10(n); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (D. Ark. 1996)(Independent Counsel's failure to comply with DOJ guidelines would provide no basis for quashing grand jury subpoena to television network)(*citing In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992) ("regulation . . . is of the kind to be enforced internally by a governmental department, and not by courts through exclusion of evidence") and *In re Grand Jury Proceedings*, 42 F.3d 876, 880 (4th Cir. 1994) (issuance of subpoenas requesting fee information from attorneys without first seeking voluntary disclosure, as required by DOJ guidelines, did not constitute grounds for quashing subpoenas)). *Compare In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996)(Penn, J.)(finding that Independent Counsel complied with guidelines without addressing whether subpoena could be quashed based on failure to comply) and *Lewis v. United States*, 501 F.2d 418, 423 (9th Cir. 1974)(assuming for purposes of argument that journalist had standing to challenge failure to comply with guidelines, but finding that guidelines were followed to the extent that they were applicable). Nor is judicial enforcement of the guidelines required by *Lopez v. Federal Aviation Administration*, 318 F.3d 242 (D.C. Cir. 2003), as the movant contends, because the apparent purpose of the guidelines was to guide the department's exercise of discretion, rather than to confer "procedural benefits" upon individuals. In any event, this Court need not decide this issue because, as discussed *infra*, the subpoena fully complies with the relevant DOJ guidelines.

A. Department of Justice Guidelines

The Department of Justice guidelines for issuing subpoenas to news media as set forth in 28 C.F.R. § 50.10 and United States Attorney's Manual § 9-2.161 provide that subpoenas for testimony of members of the news media must be approved by the Attorney General,[12] and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation–particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." § 50.10(f)(1);

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain the desired information from alternative sources. § 50.10(b); § 50.10(f)(3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. § 50.10(f)(6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." § 50.10(f)(4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. "Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its

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[12] As set forth in the Affidavit of Special Counsel, prior to issuing the instant subpoena, Special Counsel determined that its issuance complied with all relevant Department of Justice guidelines. The movant does not contest the Special Counsel's authority to approve subpoenas to members of the media in connection with the instant investigation.

willingness to respond to particular problems of the media." § 50.10(c). More generally, the guidelines provide that determinations regarding the issuance of subpoenas to members of the news media should be made with a goal of striking "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," (§ 50.10(a)), and "avoiding claims of harassment" (§ 50.10(f)(5)).

B. Balancing Test Applicable in Civil Cases

As discussed above, the D.C. Circuit has held that, in balancing "the public interest in protecting the reporter's sources against the private interest in compelling disclosure" in the context of civil litigation, the district court should consider (a) whether the information sought "is of central importance" to the litigant's claim or defense; (b) whether the litigant has exhausted reasonable alternative sources of the information; and (c) whether the journalist is a party to the action. *Zerilli v. Smith*, 656 F.2d 705, 712-14 (D.C. Cir. 1981). *See also Alexander v. FBI*, 186 F.R.D. 21, 49 (D.D.C. 1998). The first two of these factors overlap with the DOJ guidelines. *See* 28 C.F.R. § 50.10(f). The third factor, whether the journalist is a party, is generally only relevant where the journalist is the defendant, in which case compliance is generally required. *See Anderson v. Nixon*, 444 F. Supp. 1195, 1199 (D.D.C. 1978)("balancing" unrealistic where newsman himself has provoked legal controversy concerning which confidential sources may have relevant information; in such cases, disclosure of confidential sources is required).

C. The Subpoena Meets and Exceeds DOJ Guidelines and Easily Satisfies the Balancing Test Applicable in Non-Grand Jury Settings.

The Need for the Information

As described in the Affidavit of Special Counsel, there are reasonable grounds to believe, based on substantial evidence obtained from non-media sources, that one or more crimes have occurred. *See* 28 C.F.R. § 50.10(f)(1). Specifically, there is reason to believe that one or more federal criminal statutes were violated in connection with disclosures to the news media of information relating to the CIA employment of Ambassador Joseph Wilson's wife (Valerie Plame), and in statements made to federal investigators, and testimony given to the grand jury, regarding those disclosures.

There is also reason to believe that the information sought by the subpoena is essential to a successful investigation, particularly with respect to guilt or innocence. *See id.* The subpoena seeks information related to specific telephone conversations between the movant and Lewis Libby, Chief of Staff to Vice President Richard Cheney, on or about July 10, 2003, and any follow up conversations. As described in the Affidavit of Special Counsel, this testimony bears a direct relationship to the grand jury's investigation and is expected to constitute direct evidence of guilt or innocence. By definition, evidence needed to establish guilt or innocence is "essential," and "goes to the heart" of a criminal case.

The movant argues that he should not be compelled to comply with the subpoena because his testimony may not be "crucial," and may be crucial only to matters other than the

"the unlawful disclosure of Ms. Plame's identity," which he characterizes as the "core mission" of the Special Counsel and grand jury. As an initial matter, the Court can determine based on the Affidavit of Special Counsel the specific issues to which the movant's testimony is relevant, and why that testimony is in fact essential to this investigation.. More fundamentally, however, movant's argument presupposes incorrectly that the grand jury's investigatory function may be artificially circumscribed. As the Supreme Court has made clear, "[t]he function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *See United States v. R. Enterprises*, 498 U.S. 292, 297 (1991). *See also Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'")(*quoting United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)). Moreover, to the extent that movant suggests or implies that inquiry into possible criminal obstruction of the investigation cannot satisfy balancing test, it cannot seriously be contended that crimes committed during the course of, and for the purpose of obstructing, the grand jury's investigation are outside the scope of the grand jury's, or the Special Counsel's, authority.

In light of the grand jury's "unique role" in the criminal justice system, the government cannot be required to show that information is "crucial" to establish guilt or innocence, or even probable cause, in order to be "essential" to the investigation. *R.*

Enterprises, 498 U.S. at 297-99 (quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973)). Rather, the issuance of a subpoena to a member of the media is justified if there is some possibility that the information sought by the subpoena is "relevant to the general subject of the grand jury's investigation" *(United States v. R. Enterprises*, 498 U.S. at 301), and not merely "peripheral" or "speculative." 28 C.F.R. § 50.10(f)(1). To interpret the term "essential" as used in the DOJ guidelines any more narrowly would result in impeding the grand jury's investigation and "frustrating the public's interest in the fair and expeditious administration of the criminal laws." *R. Enterprises*, 498 U.S. at 297-99 (quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973)).

Therefore, the subpoena meets and exceeds the standards set forth in § 50.10(f)(1) of the DOJ guidelines, as well as the first prong of the balancing test applicable to civil actions under D.C. Circuit law.

Lack of Alternative Sources of Information

As described in the Affidavit of Special Counsel, prior to the issuance of the challenged subpoena, extensive efforts were made to obtain relevant information from alternative sources. *See* §§ 50.10(b) and 50.10(f)(3). However, because the movant was the only other party to the telephone conversations concerning which the movant's testimony is sought, there exists no alternative source of the information sought by the subpoena. Therefore, the subpoena meets both § 50.10(b) and (f) of the DOJ guidelines (*see In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 6 (D.D.C. 1996)), and the second prong of the *Zerilli*

balancing test (*see, e.g., N.L.R.B. v. Mortensen*, 701 F. Supp. 244, 249 (D.D.C. 1988)(compliance required where reporters were the only other participants in conversations with source and, thus, were the "direct and most logical source" of information regarding statements made during conversations)).

Limited Scope of the Subpoena

The information sought by the subpoena is appropriately limited to specific topics and time periods. *See* 28 C.F.R. §§ 50.10(f)(4) and 50.10(f)(6). Specifically, the information sought is strictly limited to one or more conversations between the movant and a single named individual, Lewis Libby, on or about July 10, 2003 (and any follow up conversations), which involved Libby complaining to the movant in his capacity as NBC Bureau Chief about the on-the-air comments of another NBC correspondent. The subpoena does not seek the production of any documents.

The extremely limited scope of the information sought by the subpoena cannot possibly be characterized as a "fishing expedition;" to the contrary, it is obvious that there is a real possibility that the information sought will be relevant, and of substantial importance, to the investigation. *See In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996). In addition, because the subpoenaed testimony is essential to the investigation and is not available from any alternative source, it appropriately is not limited to the "verification of published information" or surrounding circumstances related to the accuracy of published information. *See* 28 C.F.R. § 50.10(f)(4); *In re Grand Jury 95-1*, 59 F. Supp. 2d at 8 (fact

that requested information was essential to investigation, and was unavailable from alternative sources created "exigent circumstances" sufficient to justify subpoena's request for information beyond mere verification of accuracy of subpoenaed documents).

Thus, the subpoena meets and exceeds DOJ guideline § 50.10(f).

Unsuccessful Negotiations with Movant

Prior to issuing the challenged subpoena, the Special Counsel, in good faith, attempted to negotiate with the movant and his counsel to obtain movant's voluntary testimony. Specifically, after receiving an agreement from the movant's counsel to engage in negotiations "off the record," meaning that the content of the negotiations would not be reported as news by NBC, the Special Counsel engaged in negotiations to obtain the movant's voluntary testimony. On May 13, 17, and 18, the Special Counsel and the movant, through counsel, engaged in negotiations during which the Special Counsel explained: (a) the limited scope of the desired testimony; (b) the fact that Lewis Libby, the only other participant in the subject conversations, had waived any agreement of confidentiality with respect to such conversations; and (c) Special Counsel's assessment that the request for the movant's testimony complied with Department of Justice guidelines in all respects.

On May 20, 2004, counsel for NBC informed the Special Counsel that, while he would agree to preserve any relevant notes, tapes, or other documents, the movant would not agree to provide testimony. Thus, despite the Special Counsel's efforts to negotiate in good faith, the movant was unwilling to provide any information absent a Court order compelling

him to do so.

Given the Special Counsel's attempts to negotiate voluntary compliance, the subpoena meets DOJ guideline § 50.10(c).

Balancing of Competing Interests

Prior to the issuance of the subpoena, the Special Counsel determined that the subpoena struck "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." *See* 28 C.F.R. § 50.10(a). One consideration is that the investigation focuses on the improper release of information for possibly purely political or retaliatory reasons, rather than the release of information in the nature of "whistleblowing." In this case, the public's interest in fair and effective law enforcement far exceeds any claimed adverse impact on the free flow of information protected by the First Amendment.

As in any criminal grand jury matter, the public has an essential interest in the "detection and prosecution of crime." *See In re Possible Violations of 18 U.S.C.*, 564 F.2d 567, 571 (D.C. Cir. 1977). *See also Branzburg v. Hayes*, 408 U.S. 665, 690, 710 (1972). If anything, the public's interest is heightened in a case such as this one, in which the crimes being investigated have national security implications, and any obstructive crimes identified would go to the very core of our criminal justice system. *See, e.g., United States v. Kiszewski*, 877 F.2d 210, 214 (2d Cir.1989) ("[P]erjury strikes at the heart of the integrity of the judicial system . . . ."); *cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238,

246 (1944)("[T]ampering with the administration of justice involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."), *overruled on other grounds by Standard Oil Co. v. United States*, 429 U.S. 17, 18 & n.2 (1976).

Moreover, as described in the Affidavit of Special Counsel, the testimony sought by the subpoena is not only relevant, but is likely to constitute direct evidence relating to guilt or innocence, and there is no alternative source for the information. Thus, the information sought by the subpoena is crucial to the successful completion of the investigation.

In contrast, the First Amendment interests implicated by the instant subpoena are minimal. As an initial matter, the confidentiality of media sources is not at issue in this case because the movant is not being asked to reveal the identity of a confidential source. To the contrary, as discussed above, the "source" has already been identified by investigators as Lewis Libby, and the information sought by the subpoena is limited to conversations with Libby.

Libby has waived any claim of confidentiality with respect to the subject conversations, thereby protecting the movant from any potential accusation of a breach of confidentiality, and from any potential impact on his credibility and trustworthiness in the eyes of other "sources." Libby's waiver essentially operates as an agreement for the movant to treat the substance of the subject conversations as "on-the-record" or "for attribution."

Such agreements made by confidential sources, and their employers,[13] are honored by members of the media every day.

While movant argues that only he can waive any "privilege" with respect to his conversations with Libby, that argument, whatever its merits, misses the point, which is that Libby's waiver reduces or eliminates any interest in non-disclosure, and tips the balance toward requiring compliance with the subpoena. *See Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 120 (D.D.C. 2002)(the absence of confidentiality may be considered "as a factor that diminishes the journalist's, and the public's, interest in non-disclosure")(quoting *In re Schoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)).

Where, as here, the source is known and has indicated that he does not object to disclosure, there is "no conceivable interest in confidentiality." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). Indeed, as noted by the Seventh Circuit in *McKevitt*, in a case such as this one (where the source wants the information disclosed and the reporter, "paradoxically," wants it secreted), the parties are "reversed from the perspective of freedom

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[13] It is also relevant to note that Russert has treated an asserted waiver of the reporter's privilege quite differently when convenient. When Richard Clarke published his book *Against All Enemies* and testified before the National Commission on Terrorist Attacks Upon the United States (also known as the September 11 Commission), Clarke became subject to intense media scrutiny. On March 24, 2004, the White House disclosed Clarke's identity as the "senior administration official" who gave a "background" briefing in August 2002. When Clarke appeared as a guest on *Meet the Press* on March 28, 2004, Russert noted that the White House had been aggressive in attacking Clarke's credibility and had identified Clarke as the source for the background briefing–without indicating any concerns about the "voluntariness" of the wauver, in which Clarke apparently played no role. (Copy of March 28, 2004, *Meet the Press* transcript, Exhibit 1). Russert did not hesitate to broadcast out of any concern that such disclosure might chill future background sources.

of the press, which seeks to encourage publication rather than secrecy." *McKevitt*, 339 F.3d at 533 (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989)).

The movant, speculatively, and paternalistically, claims that Libby's waiver should be ignored because it may have been coerced. However, the waiver, signed with the assistance of counsel, refutes the movant's claim. In any event, any residual interest in non-disclosure on the part of Libby, rather than the public, is not worthy of protection, and should not weigh in the balance. As recognized in *Lee v. United States Department of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003), citing *Branzburg* at 691-92, it is doubtful whether any "truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal." In fact, no public policy protects the "free flow" of information at issue in this case; to the contrary, the disclosure of information regarding a CIA employee may not only be illegal, but may threaten the security of the employee, as well as the nation. Accordingly, public policy weighs heavily in favor of, rather than against, "chilling" such disclosures by public officials.

The movant's claims that the subpoena impinges on his "right to maintain confidential relationships with sources," and could have adverse effects on his newsgathering efforts in the future, are highly generalized and particularly speculative given the particular facts of this case. The conversations at issue, which were initiated by Libby, related to Libby's complaint about coverage by another broadcast journalist, as well to information

allegedly imparted by movant to Libby, rather than the reverse. However broadly the movant wishes to define "newsgathering,"[14] it is far from clear that compelled disclosure of the information required by the instant subpoena reasonably could be expected to have an adverse impact on the movant's future newsgathering efforts, much less on the efforts of other journalists.

As movant asserts, journalists rely heavily on confidential sources. Public officials, in turn, rely on journalists to get their views before the public. Contrary to movant's contention, given the powerful interests that underlie the "symbiotic" relationships between journalists and public officials, it is highly doubtful that these relationships would be threatened by requiring that journalists with information relevant to crime disclose such information to the grand jury. *See Branzburg*, 408 U.S. at 694-95. Indeed, as the majority reasoned in *Branzburg*, whatever speculative risk such a requirement creates is worth taking because the alternative – allowing crime to go undetected or unpunished – is unacceptable. *Id.*

The First Amendment guarantees a free press primarily because of the important role it can play as "a vital source of public information." *Zerilli v. Smith*, 656 F.2d 705, 710-11

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[14] Movant's broad definition of communications implicating movant's "newsgathering" activities, *i.e.*, every single contact with a government employee, whether "in a formal interview, a cocktail reception, or a phone call initiated by one of them to complain about news coverage," is not supported by the case law. *See Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d at 120-21 (journalist claiming the privilege must demonstrate that, at the time he sought, gathered or received the subject material, he intended to disseminate it to the public); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (even confidential source information must be disclosed in response to a grand jury subpoena)(citing *Branzburg).*

(D.C. Cir. 1981)(quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)). In this case, given the minor potential impact of disclosure on the free flow of information to the public, and the compelling interests of the public in disclosure, a balancing of interests overwhelmingly favors requiring that the movant comply with the instant subpoena.

CONCLUSION

For all of the foregoing reasons, the Special Counsel respectfully requests that this Court enter an order compelling movant Tim Russert to appear and testify before the grand jury in response to the subpoena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 16th day of June, 2004, I caused to be served by facsimile and Federal Express (overnight delivery) a true and correct copy of the foregoing filing entitled "GOVERNMENT'S RESPONSE TO MOTION OF NON-PARTY TIM RUSSERT TO QUASH GRAND JURY SUBPOENA" as follows:

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5 of 44 DOCUMENTS

SHOW: Meet the Press (10:00 AM ET) - NBC

March 28, 2004 Sunday

LENGTH: 7783 words

HEADLINE: Richard Clarke discusses the investigation into 9/11

BODY:

MR. RUSSERT: And Richard Clarke is here.

Welcome to MEET THE PRESS.

MR. CLARKE: Good morning, Tim.

MR. RUSSERT: You have written "Against All Enemies: Inside America's War on Terror," testified before the September 11th Commission; also testified two years ago to a congressional joint inquiry, which prompted the leader of the Republicans in the Senate, Bill Frist, on Friday afternoon to take to the Senate floor and talk about you. Let's listen:

(Videotape, Friday):

SEN. BILL FRIST, (R-TN): Mr. Clarke has told two entirely different stories under oath; two entirely different stories under oath. In July 2002 in front of the congressional joint inquiry on the September the 11th attacks, Mr. Clarke testified under oath that the administration actively sought to address the threat posed by al-Qaeda during its first seven months in office. Madam President, it is one thing for Mr. Clarke to dissemble in front of the media, in front of the press, but if he lied under oath to the United States Congress, it's a far, far more serious matter.

As I mentioned, the Intelligence Committee is seeking to have Mr. Clarke's previous testimony declassified so as to permit an examination of Mr. Clarke's two differing accounts. Loyalty to any administration will be no defense if it is found that he has lied before Congress.

(End videotape)

MR. RUSSERT: Your reaction?

MR. CLARKE: Well, I think that this is part of a general pattern of the White House and the Republican National Committee and the president's re-election committee distributing talking points like that to senators and to press and to media trying to make me the issue and trying to engage in character assassination. I'm not the issue. Now, we can talk about the specifics of their allegations.

MR. RUSSERT: Is there any inconsistency between your sworn testimony before the September 11 Commission last week and two years ago before the congressional committee?

MR. CLARKE: No, there isn't. And I would welcome it being declassified, but not just a little line here or there. Let's declassify all six hours of my testimony.

MR. RUSSERT: You would request this morning that it all be declassified?

MR. CLARKE: And I want more declassified. I want Dr. Rice's testimony before the 9-11 Commission declassified, and I want the thing that the 9-11 Commission talked about in its staff report this week declassified because there's been an issue about whether or not a strategy or a plan or something useful was given to Dr. Rice in e

January. And she says it wasn't. So we now have the staff report of the 9-11 Commission, and it says, "On January 25th, Clarke forwarded his December strategy paper to the new national security adviser, and it proposed covert action to the Northern Alliance in Afghanistan, significantly increasing CIA funding, retaliating for the USS Cole, arming the Predator aircraft, going after terrorist fund raising."

Now, Dr. Rice has characterized this as not a plan, not a strategy, not a series of decisions which could be made right away, but warmed-over Clinton material. Let's declassify that memo I sent on January 25th and let's declassify the national security directive that Dr. Rice's committee approved nine months later on September 4th, and let's see if there's any difference between those two, because there isn't. And what we'll see when we declassify what they were given on January 25th and what they finally agreed to on September 4th, is that they're basically the same thing and they wasted months when we could have had some action.

MR. RUSSERT: But to be clear, Mr. Clarke, you would urge Congress, the intelligence committees, to declassify your sworn testimony before the congressional inquiry two years ago as well as your testimony before the September 11th Commission?

MR. CLARKE: Yes, and those documents I just referred to and Dr. Rice's testimony before the 9-11 Commission because the victims' families have no idea what Dr. Rice has said. There weren't in those closed hearings where she testified before the 9-11 Commission. They want to know. So let's take her testimony before the 9-11 Commission and make it part of the package of what gets declassified along with the national security decision directive of September 4 and along with my memo of January 25.

In fact, Tim, let's go further. The White House is selectively now finding my e-mails, which I would have assumed were covered by some privacy regulations, and selectively leaking them to the press. Let's take all of my e-mails and all of the memos that I've sent to the national security adviser and her deputy from January 20 to September 11 and let's declassify all of it.

MR. RUSSERT: As well as her responses?

MR. CLARKE: As well as her responses.

MR. RUSSERT: As you know, the White House has been rather aggressive trying to undercut your credibility. They've released an e-mail which says it's Richard Clarke vs. Richard Clarke. This is now last week on "60 Minutes." "...I find it outrageous that the president is running for re-election on the grounds that he's done such great things about terrorism. He ignored it. He ignored terrorism for months ... I think he's done a terrible job on the war against terrorism." And the White House then says then and they refer to a background briefing you gave reporters which has now been placed on the record. "...the Bush administration decided then, you know, [in late] January, to do two things. One, vigorously pursue the existing policy, including all the lethal covert action findings ... The second thing the administration decided to do is to initiate a process to look at those issues which had been on the table for a couple of years and get them decided. ...[T]hat process which was initiated in the first in February, uh, decided in principle, uh in the spring to add to the existing Clinton strategy and to increase CIA resources, for example, for covert action, five-fold, to go after al Qaeda. [T]he principals met at the end of the summer [of 2001], approved them in their first meeting, changed the strategy by authorizing the increase in funding five-fold, changing the policy on Pakistan, changing the policy on Uzbekistan, changing the policy on the Northern Alliance in Afghanistan. And then changed strategy from one of rollback with al Qaeda over the court [of] five years, which it had been, to a new strategy that called for the rapid elimination of al Qaeda." There you are...

MR. CLARKE: And it's not inconsistent. Let me explain. I was asked by Condi Rice, by the White House press secretary, by the White House chief of staff, to give a press background. Why? Because Time magazine had come out--and this was almost a year after September 11. Time magazine had come out with a cover story, after extensive research, and the cover story was devastating. The cover story of Time magazine was that the White House had been given a plan by me on January 25 and had taken the entire nine months to get around to looking at it, at the principals level, that there had been over 100 meetings of Dr. Rice's committee on subjects involving Iraq, Star Wars, China, but only one on terrorism and that one was on September 4.

Now, the White House naturally wanted someone to say that things had been going on during that summer. I said, "Well, you know, it's true. Things had been going on. But the plan wasn't approved until September 4." And I was told, "But you can say that it was approved by the deputies. You can say that things were approved in principle." I was told

to spin it in a positive way.

Now, the question is: Why do you do that? I thought Pat Buchanan, a conservative Republican, former White House aide, put it pretty well last night when he was asked the same question. He said, "When you're in the White House, you may disagree with policy." But when you're asked to defend that policy, you defend it, if you're a special assistant to the president, as Pat Buchanan was and as I was. I had a choice. I could have done what I was asked to do and defend them when they were being criticized for not having done enough before September 11 or I could have resigned. Why didn't I resign? Because I believed it was very, very important for the United States to develop a plan to secure its cyberspace from terrorism. And the president had asked me to do that. I did it. I didn't get it done until February of 2003. Here it is: The National Plan to Secure Cyberspace, which the president thanked me for effusively. I wouldn't have been able to do this--important document if I had quit on the date that you suggest. And so there's no inconsistency. I said the things that I was told to say. They're true. We did consider these things but no decisions were taken. And that's the point. It was an important issue for them but not an urgent issue. They had a hundred meetings before they got around to having one on terrorism.

MR. RUSSERT: But if you were willing to go forward, and, as you say, "spin" on behalf of the president, then why shouldn't people now think that this book is also spin? Why should people believe you?

MR. CLARKE: Because I have no obligation anymore to spin. When you're in the White House, you spin. And people have been doing a lot of that against me this week. You know, they're engaged in a campaign. People on the taxpayers' rolls, dozens of people, are engaged in the campaign to destroy me, personally and professionally, because I had the temerity to suggest that the American people should consider whether or not the president had done a good job on the war on terrorism. The issue is not me. The issue is the president's job on the role on terrorism.

I think, before 9/11, he himself said--if you look at what he said to Bob Woodward, he himself said before 9/11, "This was not an urgent issue for me. I didn't feel a sense of urgency." He acknowledged bin Laden was not the focus of him or his national security team. So, before 9/11, not as focused. After 9/11--I say by going into Iraq, he has really hurt the war on terrorism. Now, because I say that, the administration doesn't want to talk on the merits of that. They don't want to talk about the effect on the war on terrorism of our invasion of Iraq. And so, instead, A, they try to do character assassination of me; but, B, they try to punish me for having said it by going after my professional life, by going after me, besmirching me. This is just not appropriate.

And you know, Tim, what I would like to do, beginning today, it's been going on for a week now. What I would like to do beginning today, is let's raise the level of discourse. Let's get some civility back into this issue. And let's talk about the issues. Let's not talk about the personalities. I have great respect for Dr. Rice. People have been saying all week that, you know, I must have a grudge against Condi Rice. I have known Condi for a long time. I think she's a very, very good person. And I don't want this to be about personality. I want it to be about the issues, about the war in Iraq and its affect on the war on terror.

MR. RUSSERT: You did tell Time magazine that the review that the administration did moved as fast as could be expected.

MR. CLARKE: I said it was the normal process for the consideration of issues. Now, it's not a normal issue, however. Every day George Tenet was going in to see the president in the Oval Office. Because George Tenet, the director of Central Intelligence, now gives the president his daily briefing. And almost every day the president was hearing from George Tenet that there's an impending al-Qaeda attack. As far back as February, George Tenet testified before the Congress that al-Qaeda was the major national security threat. And yet, they have 100 meetings before they get around to dealing with it.

MR. RUSSERT: On a scale of one to 10, how would you rate President Bush's performance on the war on terror prior to September 11?

MR. CLARKE: Well, there wasn't any personal performance by the president prior to September 11. Now, the only thing that I was ever able to detect that he did on the war on terrorism was after Tenet had been briefing him day after day after day about an al-Qaeda threat, the president said, in May, "Well, let's, you know, get a strategy." That's the only thing I ever heard that he got involved in personally. And when he said that, Dr. Rice called me and said, "The president wants a strategy." And I said, "Well, you know the strategy was what I sent you on January 25, and it's been stuck in these low-level committees." And she said, "Fine. I'll deal with that." Well, she didn't deal with it until

September.

And, interestingly enough, the president never said after that May conversation, "Where's the strategy?" And, again, if you go back to what the president himself says to Bob Woodward, he said, "I knew there was a strategy in the works. But I didn't know how mature the plan was." He's saying this on September 11. He didn't know where the strategy was. The strategy that he had asked for in May? He'd never come back and asked where it was. You know, basically, it wasn't an urgent issue for them before September 11.

MR. RUSSERT: It sounds like a failing grade.

MR. CLARKE: Well, I think they deserve a failing grade for what they did before because, frankly, they didn't do--they never got around to doing anything. They held interim meetings, but they never actually decided anything before September 11.

MR. RUSSERT: Now, when you resigned, you sent a very polite letter to the president: "It's been an enormous privilege to serve you these past 24 months. I will always remember the courage, determination, calm leadership you demonstrated on September 11. I thank you again for the opportunity to serve you. You have provided me"--was that just being polite?

MR. CLARKE: Yeah.

MR. RUSSERT: Or are you now just being disloyal?

MR. CLARKE: No. Well, my mother taught me to be polite. Let me read another line from the letter, which I have. I don't know what you have over there. But this is the actual letter. "I will always have fond memories of our briefings for you on cybersecurity." Not on terrorism, Tim, because they didn't allow me to brief him on terrorism. You know, they're saying now that when I was afforded the opportunity to talk to him about cybersecurity, it was my choice. I could have talked about terrorism or cybersecurity. That's not true. I asked in January to brief him, the president, on terrorism, to give him the same briefing I had given Vice President Cheney, Colin Powell and Condi Rice. And I was told, "You can't do that briefing, Dick, until after the policy development process."

MR. RUSSERT: Who told you that?

MR. CLARKE: Condi Rice. And I said, "Well, can I brief him on cybersecurity?" "Oh, yes, you can brief him on that." Now, you read my letter to him. Let's read his letter back to me. Maybe you'd like to read it, if you can read this.

MR. RUSSERT: Go ahead, please.

MR. CLARKE: This is his writing. This is the president of the United States' writing. And when they're engaged in character assassination of me, let's just remember that on January 31, 2003: "Dear Dick, you will be missed. You served our nation with distinction and honor. You have left a positive mark on our government." This is not the normal typewritten letter that everybody gets. This is the president's handwriting. He thinks I served with distinction and honor. The rest of his staff is out there trying to destroy my professional life, trying to destroy my reputation, because I had the temerity to suggest that a policy issue should be discussed. What is the role of the war on terror vis-a-vis the war in Iraq? Did the war in Iraq really hurt the war on terror? Because I suggest we should have a debate on that, I am now being the victim of a taxpayer-paid--because all these people work for the government--character assassination campaign.

MR. RUSSERT: We'll get to that particular debate, but let me go back to September 11 and what led up to it. The Washington Post captured this way: "On July 5 of 2001, the White House summoned officials of a dozen federal agencies to the Situation Room. 'Something really spectacular is going to happen here, and it's going to happen soon,' the government's top counterterrorism official, Richard Clarke, told the assembled group, including the Federal Aviation Administration, Coast Guard, FBI, Secret Service, Immigration and Naturalization Service. Clarke directed every counterterrorist office to cancel vacations, defer non-vital travel, put off scheduled exercises, place domestic rapid-response teams on much shorter alert. For six weeks in the summer of 2001, at home and overseas, the U.S. government was at its highest possible state of readiness--and anxiety--against imminent terrorist attack."

Did Dr. Rice instruct you to organize that meeting?

MR. CLARKE: No. I told her I was going to do it. And I had already been doing it two weeks before, because on June 21, I believe it was, George Tenet called me and said, "I don't think we're getting the message through. These

people aren't acting the way the Clinton people did under similar circumstances." And I suggested to Tenet that he come down and personally brief Condi Rice, that he bring his terrorism team with him. And we sat in the national security adviser's office. And I've used the phrase in the book to describe George Tenet's warnings as "He had his hair on fire." He was about as excited as I'd ever seen him. And he said, "Something is going to happen."

Now, when he said that in December 1999 to the national security adviser, at the time Sandy Berger, Sandy Berger then held daily meetings throughout December 1999 in the White House Situation Room, with the FBI director, the attorney general, the head of the CIA, the head of the Defense Department, and they shook out of their bureaucracies every last piece of information to prevent the attacks. And we did prevent the attacks in December 1999. Dr. Rice chose not to do that.

Now, in retrospect, we now know that there was information in the FBI that hadn't bubbled to the top, that two of the hijackers were in the United States. If we had had that kind of process in the summer of 2001 that we had in December '99, where the national security adviser was every day in the White House asking the FBI director and the attorney general and the secretary of defense, "Go back to your building, find out all that you can"--if we had done that in the summer of 2001, maybe the information that was in the FBI would have shaken loose.

MR. RUSSERT: But you kept your guard up for six weeks, through the end of August. Why didn't you stay on high alert through September 11th? And you regret this day that you didn't because you may have stopped that attack.

MR. CLARKE: We kept up the high alert for some facilities that could keep up the high alert. The Defense Department, the chairman of the Joint Chiefs and others, said that they were physically not capable of keeping the troops overseas, for example, on high alert any further, that they were exhausting the troops. And, therefore, they unilaterally came down off of alert. We kept all of our counterterrorism forces in the United States on alert. We continued to send out threat advisories to the airports and the airlines. We continued to send out information to 18,000 state and local police departments and to Immigration and Customs and Secret Service and Coast Guard.

MR. RUSSERT: You included the FAA, the Federal Aviation Administration. Was there any briefing at that time or around that time which suggested that al-Qaeda may hijack an airplane to be used in a terrorist attack?

MR. CLARKE: Apparently, the president got a briefing when he was on vacation in Texas. Apparently, the CIA gave him a paper that listed all of the things al-Qaeda could do. It didn't focus on a hijacking. But apparently, it listed a hijacking as among the things that al-Qaeda could do, even though al-Qaeda had never done it before. But long before that August 6 briefing at the ranch in Texas, we had brought in the FAA, which under the presidential directive was in charge of airline security, and told them increase security in the United States on airlines at airports, not because we had the intelligence that this was about to happen, but because it was a prudential thing to do, knowing that some unknown attack was coming.

MR. RUSSERT: Dr. Rice has said that no one could have predicted the use of an airline hijacking for this kind of attack.

MR. CLARKE: Well, actually we did, beginning in 1996. As I describe in the book, at the Atlanta Olympics, the counterterrorism team from Washington, which I chaired, came down three months before the Atlanta Olympics and checked out the security. And we asked, "What happens if someone hijacks a jet and flies it into the stadium?" and no one had a plan for that. And so we quickly cobbled together a plan for that using helicopters, no-fly zones, snipers, air-defense radars. We did that again for five or six events over the course of the next five years. And I tried to get the authority, and I tried to get the money to make it a permanent capability to protect the Congress and the White House. But I wasn't able to do that.

MR. RUSSERT: You mentioned the September 15 e-mail that you sent to Dr. Rice. And here's a portion of it.

"Note to: CDR. When the era of national unity begins to crack in the near future, it is possible that some will start asking questions like did the White House do a good job of making sure that intelligence about terrorist threats got to FAA and other domestic law enforcement authorities.

"As the attached paper (which we sent you in July) and e-mail (also July) note: -In late June, the interagency Counter Terrorism Security Group which I chaired warned of upcoming 'spectacular' al Qida attack that that would be 'qualitatively different.' We convened on 5 July a special meeting of domestic law enforcement.

"...Thus, the White House did insure that domestic law enforcement (including FAA) knew that the

Counterterrorism Strategy Group believed that a major al Qida attack was coming and it could be in the US ...and did ask that special measures be taken. -rac," Richard A. Clarke.

MR. CLARKE: That's right.

MR. RUSSERT: Is that a CYA memo saying, "Condi, this is how you spin if you're criticized for not doing enough?" Were you complicit in that?

MR. CLARKE: I wasn't complicit in anything. There was a great fear in the White House after 9/11 that people would wonder why things hadn't been done and who was involved. Was the president involved? Was Dr. Rice involved? Was--who did what? And so what I was saying to them in answer to their concern was I did these things. My committee did these things.

Now, again, contrast that to December 1999 when we had similar indicators that something big was going to happen around the period of the millennium, there were going to be three major attacks around the world. Actually we thought at the time there would be five. And all of those kinds of things that I described in that e-mail that I did at my level in 2001, the national security adviser did at his level in December 1999.

MR. RUSSERT: But you're saying the White House did this. You're suggesting to Condi, "These are your talking points. This is your spin if you're asked whether or not the White House was prepared for this kind of attack."

MR. CLARKE: That's not spin. It's facts. I'm recounting what I did. She had asked me, "What did you do prior to 9/11?" And I'm telling her what I did prior to 9/11.

MR. RUSSERT: As you know, your motivation has been widely questioned both at the White House and by some on Capitol Hill. One article captured it this way: "Mr. Clarke... who had sought the No. 2 spot at Homeland Security, was passed over for the post in October 2002 and demoted by Secretary Tom Ridge and National Security Adviser Condoleezza Rice to the position of special adviser for cyberspace security." You had applied for a position and didn't get it. Are you a disgruntled job-seeker?

MR. CLARKE: Now, here we go again, you know, with it's about Dick Clarke and it's about his motivation, when really this is what the White House is trying to get you and others to do is to focus on me. I'll answer the question, Tim, but I want to point out again that this is about the president's job in the war on terrorism. This is about how going into Iraq hurt the war on terrorism. This is not about Dick Clarke. Dick Clarke's not running for office.

MR. RUSSERT: But the messenger's important.

MR. CLARKE: No, no, I understand. So let me answer the question.

MR. RUSSERT: And people have questioned your motivation. Were you happy? Did you feel dissed for being passed over?

MR. CLARKE: No. And the information you read is somewhat inaccurate. I wasn't demoted to a position of national cybersecurity adviser. I--and there's lots of paper trail on this one. I asked in June of 2001 to be transferred from the terrorism job, I did and my chief of staff, Roger Cressey, did, because in June 2001, we were so frustrated with the administration's lackadaisical attitude toward terrorism that we no longer wanted to work on the issue. As obsessed as I was with going after al-Qaeda, I felt I had to get out of the terrorism business because I couldn't work for an administration that was treating it in such an unimportant way. I asked the president to create the position of special adviser to the president for cyberspace security so that I could go into it. I didn't consider it a demotion. I considered it an important job and I consider it today, the protection of our cyberspace, to be a very important task which we haven't done...

MR. RUSSERT: But you were turned down for the number-two job at Homeland Security?

MR. CLARKE: No, I wasn't turned down for it. What happened was the White House was developing lists of people to consider for various jobs. And I said, "If you want to consider me, fine. I've been working on homeland security issues for five years."

MR. RUSSERT: Did you interview for it?

MR. CLARKE: I was interviewed for it. Am I disgruntled about it? No. Is that the reason I wrote the book? Let's talk about motivation. You're asking me is that the motivation. So let's talk about what the motivation actually is. The

actual motivation for writing this book is to, number one, tell the people who have been asking me for two or three years, you know, what happened on 9/11 and why couldn't we stop it. I hope the 9-11 Commission answers those questions, too. But I had to get it off my chest. I had to tell the families of the victims. I had to tell lots of people who have been asking me, "What went wrong? And how, with all of your experience, can you advise us on what mistakes you made personally? Can you advise us not to make those mistakes again, and with that experience, how do you advise us about structuring the government so that we can avoid this kind of thing in the future?" I had to get it off my chest. That's the motivation.

MR. RUSSERT: Publishers Weekly in January said that your book would come out, as it shows on the screen here, on April 27. It was then released the day before the September 11th Commission hearings. Was the book released, accelerated and timed for maximum exposure before those hearings?

MR. CLARKE: I left the White House in February. I started working on the book in March. It's the first time I ever wrote a book. It turns out it's a lot harder to write a book, Tim, than it is to write government memos; had to do a lot of research, and I didn't have any access to my government files. I didn't have any classified papers. So I finished the book in October and had to turn it in to the White House for them to approve it. As a former White House official, your books have to be approved by the White House. And the White House took a very long time to approve my book. As soon as the book was approved by the White House in February, I gave it to the publisher and it was out of my hands after that. The publisher got it out as fast as they could. Our original intention was to...

MR. RUSSERT: Because the White House delayed publication. You had scheduled April 22.

MR. CLARKE: No, I hadn't scheduled anything.

MR. RUSSERT: The publisher had. You moved it up by more than a month to coincide with the hearings?

MR. CLARKE: I didn't. Tim, I turned the book in in February. I have no control over what Publishers Weekly says or when the printing presses are available. I wanted it to be a Christmas book. And I turned it in time for it to get out at Christmas had the White House not sat on it in the White House approval process.

MR. RUSSERT: And, again, this has become part of the controversy. Again, Senator Frist went to the Senate floor and let's listen:

(Videotape, March 26, 2004):

SEN. FRIST: Assuming the controversy around this series of events does, in fact, drive the sales of his book, Mr. Clarke will make a lot of money, a lot of money for exactly what he has done. I personally find this to be an appalling act of profiteering, of trading on insider access to highly classified information and capitalizing upon the tragedy that befell this nation on September the 11th, 2001. Mr. Clarke must renounce, I think, any plan to personally profit from this book.

(End videotape)

MR. RUSSERT: The book is dedicated to those who were murdered on September 11 and you apologize to the families. Would you consider giving the royalties or profits from the book to the children of those families who were murdered?

MR. CLARKE: Tim, long before Senator Frist said what he said, I planned to make a substantial contribution, not only to them but also to the widows and orphans of our Special Forces who have fought and died in Afghanistan and Iraq. And when we see the results of the book sales, we'll know how much we have to make donations. I also have to consider the fact that friends of mine in the White House, because I still have friends in the White House, having worked there for 11 years, are telling me that the word is out in the White House to destroy me professionally. One line that somebody overheard was "he's not going to make another dime again in Washington in his life." So I have to take that into account, too, this sort of vicious personal attack is also directed at my bank account. But this is not about me making money. It's about getting the truth out. And long before Senator Frist said what he said, I planned to make substantial donations, and I will make substantial donations.

MR. RUSSERT: Forty-two family members wrote an open letter which is in the papers today saying that the book is offensive and profiteering and maximizing book sales because of September 11. What do you say to those families?

MR. CLARKE: Well, I say I'd like them to read it. You know, as to Senator Frist's comments, that it's filled with

highly classified information, it was approved by the White House for release. And anything that the White House found in it that they thought was highly classified was removed. You know, I had a very emotional meeting with the families after the commission hearing. I had asked for their forgiveness in my testimony. And several of them came up to me and said, "I forgive you, I forgive you." It was a moment that I will never forget. And for Senator Frist to say that I didn't have the right to ask for their forgiveness, that I didn't have the right to apologize, I just think is an example of how this whole debate has gotten overheated. And I'd like to return to a level of civility here.

MR. RUSSERT: Do you believe that President Bush should apologize to the families?

MR. CLARKE: Everyone has to make their own decisions about that. If he doesn't feel it in his heart that he has anything to apologize for then, no, he shouldn't.

MR. RUSSERT: How about President Clinton, when the planning for September 11 largely occurred?

MR. CLARKE: Again, I think if they feel it in their heart, they should do it. If they don't, they shouldn't. It's a matter of personal decision.

MR. RUSSERT: We're going to take a quick break and come back and talk about the role of terrorism during the Clinton administration and the Iraq war. A whole lot more. Richard Clarke, the former White House terrorism chief, is with us this morning. More after this.

(Announcements)

MR. RUSSERT: More with the man at the center of a storm here in Washington, Richard Clarke, after this station break.

(Announcements)

MR. RUSSERT: We are back with former White House counterterrorism chief and author of "Against All Enemies: Inside America's War on Terror," Richard Clarke.

Vice President Cheney also offered some comments about your performance during the Clinton administration, and here's what he said: "The other thing I would say about Dick Clarke is that he was here throughout those eight years, going back to '93, and the first attack on the World Trade Center; and '98, when the embassies were hit in East Africa; in 2000, when the USS Cole was hit. And the question that ought to be asked is, what were they doing in those days when he was in charge of counterterrorism efforts?"'

The Washington Post did an analysis of the September 11 Commission reports, your book and testimony and everyone else's, and concluded in an analysis piece, "Bush, Clinton varied little on terrorism." Would you concur with that?

MR. CLARKE: No, not really. Let's answer Dick Cheney's question: What was the Clinton administration doing and what did it fail to do? Because it failed to do some things. Thirty-five Americans over the course of eight years--35 Americans--were killed by al-Qaeda during the Clinton years. And as a result of those 35 deaths, President Clinton ordered the assassination of Osama bin Laden, breaking with years of tradition and precedent, and the assassination of his deputies, by CIA. He fired cruise missiles into a base where he thought bin Laden was going to be. He launched a series of diplomatic, intelligence, law enforcement, military steps against al-Qaeda.

What he failed to do was to take all of the camps in Afghanistan where these terrorists were being trained on a conveyor belt that was turning out thousands of people and sending them overseas--what he failed to do was to eliminate them, just to bomb them. Now, there were lots of other things going on in the world. And to be fair, he had the Middle East peace process close to an agreement. He was bombing in Serbia. He was bombing in Iraq. In retrospect, with 20/20 hindsight, people now understand that he should have bombed the camps. I said so at the time.

MR. RUSSERT: In '96 when Osama left Sudan, stopped and refueled in the country of Qatar to go to Afghanistan, there were also discussions at that time, according to President Clinton, to turn Osama over to the Saudis or perhaps, some others suggested, snatching Osama at the refueling.

MR. CLARKE: Right.

MR. RUSSERT: Should we have done that?

MR. CLARKE: Well, if the CIA had been capable of doing it, we would have. We began looking with the CIA and Delta Force at options to snatch bin Laden in 1996, 1997, 1998, and they were unable do so. And this is one of the things I talk about in the book, the need to strengthen our intelligence and military capability so that we can do things like that.

What else did Clinton do, however? We had Iraqi-sponsored terrorism against the United States; he used military force, and they stopped. We had Iranian-sponsored terrorism against the United States; he used covert action against them, and they stopped. We had al-Qaeda attempts to blow up things in the United States during the millennium period, attempts to blow up embassies around the world, attempts to take over Bosnia during the jihad in Bosnia. And all of those attempts were thwarted.

Now, that doesn't mean that he did everything he should have done, but the president of the United States was active on these issues in the Clinton administration. The president of the United States was not active on these issues prior to 9/11 in the Bush administration.

MR. RUSSERT: Some critics have said, Mr. Clarke, that you're much more forgiving and tolerant of President Clinton than you have been of President Bush. Charles Krauthammer wrote this essay.

"In March of 2002, a 'Frontline' interviewer asked Clarke whether failing to blow up camps and take out the Afghan sanctuary was a 'pretty basic mistake.' Clarke's answer is unbelievable; 'I'm not prepared to call it a mistake. It was a judgment made by people who had to take into account a lot of other issues." The Middle East was going on. "There was the war in Yugoslavia going on. People above my rank had to judge what could be done in the counterterrorism world at a time when they were also pursuing other national goals."

"This is significant for two reasons. First, if Clarke of 2002 was telling the truth, then the Clarke of this week--the one who told the September 11 Commission under oath that 'fighting terrorism in general and fighting Al Qaeda, in particular, were an extraordinarily high priority in the Clinton administration--certainly [there was] no higher priority'--is a liar."

"Second, he becomes not just a perjurer but a partisan perjurer. He savages President Bush for not having made Al Qaeda his top national security priority, but he refuses even to call a 'mistake' Clinton's staggering dereliction in putting Yasser Arafat and Yugoslavia (!) above fighting Al Qaeda."

And also, when the USS Cole was bombed, there was a riveting scene in your book with Mike Sheehan from the State Department, who screamed out, "What's it going to take, Dick? Who the" expletive "do they think attacked the Cole," expletive "Martians? The Pentagon brass won't let Delta go in there? Hell, they won't even let the Air Force carpet bomb the place. Does al-Qaeda have to attack the Pentagon to get their attention?"

MR. CLARKE: I...

MR. RUSSERT: President Clinton did not bomb the al-Qaeda camps that you wanted, destroy them, did not respond after the Cole was attacked, 17 sailors killed.

MR. CLARKE: Sure. Right. Right.

MR. RUSSERT: And yet, you're saying that he was more aggressive than President Bush?

MR. CLARKE: Well, he did something, and President Bush did nothing prior to September 11. So, yeah.

But let's talk about the Cole. The Cole was attacked in October of 2000. President Bush was running for office; he never mentioned it. Vice President Gore was running for office; he never mentioned it. The media hardly touched it. What were they focused on? They were focused on the election, and they were focused on the Middle East peace process. I thought it was a mistake, and the very fact that I quote Mike Sheehan in the book as saying that I think is indicative of how he felt and how I felt. If I didn't think it was a mistake, that wouldn't be in the book.

The facts have come out, and the facts have come out before the 9-11 Commission that the FBI and the CIA refused to say who did it in October of 2000. And the president was, therefore, faced with the problem, "Can I go ahead and bomb somebody in retaliation for the attack on the Cole when my CIA director and my FBI director won't say who did it?"

Now, this is the same president who, when he bombed Afghanistan, when he bombed al-Qaeda camps, because

George Tenet and I and Sandy Berger recommended he do it in order to get bin Laden and the leadership team, where we thought they were going to be meeting, the reaction he faced to that was the so-called wag the dog phenomenon. No one in the media, Tim, no one in the media, no one in the Congress said, "Oh, that's a great thing that you're retaliating for the attack on the United States," they said, "This is all about Monica Lewinsky, and this is all about your political problems."

So now the same president who had that experience last time he fired cruise missiles at bin Laden wants to fire cruise missiles at bin Laden, but he's got a CIA director and an FBI director who won't say, "Bin Laden did it, Mr. President." I would still have done it; I recommended doing it. Do I think it was mistake that we didn't do it? Yes. But let's understand the context.

MR. RUSSERT: Let me turn to Iraq and this is what you told the September 11th Commission on Wednesday:

(Videotape, March 24, 2004):

MR. CLARKE: By invading Iraq, the president of the United States has greatly undermined the war on terrorism.

(End videotape)

MR. RUSSERT: And in your book, you write this. "From within the White House, a decision had been made that in 2002 congressional elections and in the 2004 re-election, the Republicans would wrap themselves in the flag, saying a vote for them was a vote against the terrorists. 'Run on the war' was the direction in 2002. Then [Karl] Rove meant the War on Terror, but they also had in mind another war that they would gin up." You are saying that President George W. Bush ginned up the war in Iraq for political reasons.

MR. CLARKE: Oh, no, I'm not. Oh, no, I'm not. Don't put words in my mouth or words in the book.

MR. RUSSERT: What are you saying?

MR. CLARKE: Read the book. What I'm saying is that when it was clear within the White House that the president intended to fight this war on Iraq, his political advisers sought to capitalize on it, just as his political advisers are seeking to capitalize on 9/11 by the ads that they're running.

MR. RUSSERT: Did you speak out against the war inside the government?

MR. CLARKE: I had spoken out again the notion of bombing Iraq immediately after September 11. And the Defense Department, deputy secretary, the secretary, talked to my bosses in the White House and indicated how unhappy they were with my attitude on Iraq. And as I say, I had asked to go and become cyberspace security adviser, so I did and I wasn't asked about foreign policy in that role. But when I had spoken out, when I said, "Invading Iraq after 9/11 is like invading Mexico after Pearl Harbor," that didn't go over well and I was very quickly sidelined as someone whose opinions were going to be taken into account.

MR. RUSSERT: Why do you think the Iraq war has undermined the war on terrorism?

MR. CLARKE: Well, I think it's obvious, but there are three major reasons. Who are we fighting in the war on terrorism? We're fighting Islamic radicals and they are drawing people from the youth of the Islamic world into hating us. Now, after September 11, people in the Islamic world said, "Wait a minute. Maybe we've gone too far here. Maybe this Islamic movement, this radical movement, has to be suppressed," and we had a moment, we had a window of opportunity, where we could change the ideology in the Islamic world. Instead, we've inflamed the ideology. We've played right into the hands of al-Qaeda and others. We've done what Osama bin Laden said we would do.

Ninety percent of the Islamic people in Morocco, Jordan, Turkey, Egypt, allied countries to the United States--90 percent in polls taken last month hate the United States. It's very hard when that's the game where 90 percent of the Arab people hate us. It's very hard for us to win the battle of ideas. We can arrest them. We can kill them. But as Don Rumsfeld said in the memo that leaked from the Pentagon, I'm afraid that they're generating more ideological radicals against us than we are arresting them and killing them. They're producing more faster than we are.

The president of Egypt said, "If you invade Iraq, you will create a hundred bin Ladens." He lives in the Arab world. He knows. It's turned out to be true. It is now much more difficult for us to win the battle of ideas as well as arresting and killing them, and we're going to face a second generation of al-Qaeda. We're going to catch bin Laden. I have no doubt about that. In the next few months, he'll be found dead or alive. But it's two years too late because during those

two years, al-Qaeda has morphed into a hydra-headed organization, independent cells like the organization that did the attack in Madrid.

And that's the second reason. The attack in Madrid showed the vulnerabilities of the rails in Spain. We have all sorts of vulnerabilities in our country, chemical plants, railroads. We've done a very good job on passenger aircraft now, but there are all these other vulnerabilities that require enormous amount of money to reduce those vulnerabilities, and we're not doing that.

MR. RUSSERT: And three?

MR. CLARKE: And three is that we actually diverted military resources and intelligence resources from Afghanistan and from the hunt for bin Laden to the war in Iraq.

MR. RUSSERT: But Saddam is gone and that's a good thing?

MR. CLARKE: Saddam is gone is a good thing. If Fidel were gone, it would be a good thing. If Kim Il Sung were gone, it would be a good thing. And let's just make clear, our military performed admirably and they are heroes, but what price are we paying for this war on Iraq?

MR. RUSSERT: We have to take another quick break. We'll be right back with Richard Clarke after this.

(Announcements)

MR. RUSSERT: And we're back. Did you vote for George Bush in 2000?

MR. CLARKE: No, I did not.

MR. RUSSERT: You voted for Al Gore.

MR. CLARKE: Yes, I did.

MR. RUSSERT: In 2004 you'll vote for John Kerry?

MR. CLARKE: I'm not going to endorse John Kerry. That's what the White House wants me to do. And they want to say I'm part of the Kerry campaign. I've already pledged I'm not part of the Kerry campaign and I will not serve in the Kerry administration.

MR. RUSSERT: Will you vote for him?

MR. CLARKE: That's my business.

MR. RUSSERT: Will you seek elective office?

MR. CLARKE: Never.

MR. RUSSERT: Fine.

MR. CLARKE: I've done 30 years in the government as a senior executive. I don't want to do it any...

MR. RUSSERT: Would you like to come back in government in another capacity?

MR. CLARKE: Never. Not a day.

MR. RUSSERT: Ever?

MR. CLARKE: Not a day.

MR. RUSSERT: It's over?

MR. CLARKE: Thirty years is enough.

MR. RUSSERT: Richard Clarke, we thank you for joining us and sharing your views.

LOAD-DATE: March 28, 2004